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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of	)	
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Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
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	)	

REPLY COMMENTS OF U S WEST, INC.

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SUMMARY

The comments filed in this proceeding present the Commission with a clear choice: Either carry out the Supreme Court's mandate by adopting rules that tailor unbundling obligations to the market characteristics corresponding to the availability of facilities outside the ILECs' network, or defy the Court by readopting an unlawful "blanket access" rule that is blind to the frenzy of CLEC self-provisioning that is taking place. Many CLEC commenters push the Commission to choose the latter. These commenters act as if the Commission's only task on remand is to make the minimum recitals necessary to reinstate Rule 319 in its entirety (or expand it), completely disregarding the Court's instructions to adopt a *limiting* standard on unbundling based on real market facts. And rather than look at the tremendous amount of facilities-based competitive entry that is occurring in the market, these commenters cite a litany of trivial costs and risks that new entrants must bear and then declare — in flat contradiction to reality — that entry is impossible without massive regulatory relief.

The Commission should reject these comments for what they are: an unprincipled plea for the Commission to defy the Supreme Court and rescue these carriers from the ordinary costs and risks of the marketplace. The Commission should adhere to five basic principles as it develops its new unbundling rules:

First, the Commission must comply with the Supreme Court's instruction to adopt necessary and impair tests that *limit* unbundling, based on an examination of the availability of facilities outside the incumbents' networks. Now that the Court has made clear that the Commission's original "*any* increase in costs" (or "*any* decrease in quality") standard violates the Act, the Commission may not reinstate that standard, whether directly or indirectly. Nor may the Commission write the necessary and impair tests out of the Act (and reinstate an

unlawful "blanket access" rule) by considering made-up *non*statutory criteria that would override the tests.

Second, the Commission should rely on the substantial and uncontradicted record evidence demonstrating that carriers are deploying competitive facilities in many markets and accordingly do not need access to incumbents' facilities in those markets. The overwhelming evidence of continued investment by CLECs in their own facilities puts the lie to the claims of many commenters that meaningful opportunities for competitive entry are impossible without blanket access to incumbents' networks.

Third, the Commission should apply the necessary and impair tests *objectively*, with reference to an efficient competitor. The Act protects competition, not individual competitors. The Commission should not be trying to dilute the test to guarantee that *every* CLEC, no matter what its size or how offbeat its business plan, can earn an immediate profit. Moreover, contrary to many CLEC commenters, the proper inquiry is not whether a new entrant CLEC faces *any* costs that an ILEC does not. Unbundling is intended to eliminate barriers of entry that go beyond the normal costs and obstacles new entrants in all markets must bear.

Fourth, the Commission can and should adopt rules that look at objective, easily measured market characteristics (such as line density) to determine where unbundling should take place. A uniform, nationwide unbundling list will be either fatally overinclusive (blunting investment incentives unnecessarily in markets where CLECs are not impaired) or fatally underinclusive (denying CLECs needed elements), leading to *more* litigation, not less.

Fifth, the Commission should decline the CLECs' invitation to resurrect rules that were struck down by the Eighth Circuit and that were not appealed to the Supreme Court. The

Commission lacks authority to reinstate its superior quality and UNE combination rules because the Eighth Circuit's vacatur of those rules was not undermined by the Supreme Court's decision. In any event, the Eighth Circuit is now considering the effect of the Supreme Court's decision, and the Commission may not circumvent this process.

With respect to specific unbundling duties, the Commission should limit itself to considering the particular elements listed in its notice. It has been impossible even to catalog the myriad of extra items that CLECs have included on their wish lists, let alone answer them. Fair notice requires that the Commission not adopt rules governing these additional items without issuing a second notice of proposed rulemaking that gives all carriers a full opportunity to comment. As for the elements that the Commission *did* previously identify, U S WEST responds as follows:

- **Loops** — Redefining the local loop to include advanced service electronics would be an obvious evasion of the Supreme Court's mandate. If an ILEC's control of a loop creates the potential for competitive harm, the proper regulatory response is for the Commission to address the issue of loop availability directly, not to regulate DSL facilities, which are readily available to CLECs from competitive providers.

  Furthermore, the Commission should not use this proceeding to give CLECs access to multi-tenant environment ("MTE") intrabuilding cable. CLECs already can compete for the business of MTE residents by either (1) leasing entire ILEC loops, or (2) laying their own fiber to the MTE and then installing their own intrabuilding cable to the demarcation points. Although some CLECs claim it is too difficult for them to install their own intrabuilding cable, that fact has nothing to do with ILEC market power.

- **Operations Support Systems** — U S WEST agrees that the five OSS functions identified in the *Local Competition Order* (pre-ordering, ordering, provisioning, maintenance and repair, and billing) meet the necessary and impair tests. However, the Commission should reject the suggestions of various commenters to expand the OSS unbundling obligation.

- **Switching** — The uncontradicted evidence that CLECs have self-deployed a massive number of switches refutes any idea that the myriad technical difficulties commenters allege are in fact real barriers to entry. Also, unbundling of switching cannot be justified on the ground that it is necessary in order to be able to use *other* elements such as loops.

- **Signaling/Call-Related Databases** — Undisputed evidence establishes that multiple CLECs have actually deployed their own signal transfer points and that signaling is available from multiple wholesale providers. In any event, the Commission certainly should reject CLEC attempts to expand the definition of this element to include greater AIN capabilities.

- **Interoffice Transmission Facilities** — The filed comments confirm U S WEST's contention that nonincumbents are able to deploy competitive fiber optic transport facilities in virtually any moderately dense market, and that nonincumbents have, in fact, deployed so much capacity in these markets that bandwidth has become a commodity product.

- **Operator Services/Directory Assistance** — Numerous parties recognize that CLECs can readily self-provision the inputs needed to provide OS/DA service and that numerous CLECs today purchase finished OS/DA services on a wholesale basis. Moreover, because section 251(b)(3) already requires LECs to provide directory listings on a nondiscriminatory basis, directory listings do not need to be unbundled pursuant to section 251(c)(3).

- **DSL and Packet Switched Services** — The filed comments support U S WEST's contention that the electronics used for DSL services are freely available to CLECs from vendors, easily scalable, and readily deployable given a few basic inputs from incumbents such as collocation. Several commenters seek the unbundling of new generic data network elements that are not tied to the xDSL services the Commission considered in its *Advanced Services Order*. These commenters, however, have not shown as a legal matter that these elements are even potentially subject to unbundling. Moreover, given the massive amount of competition in the market for packet-switched services, they cannot make (and do not even try to make) the *factual* showing necessary to justify unbundling under the "impairment" standard.

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REPLY COMMENTS OF U S WEST, INC.

In its opening comments, U S WEST Communications, Inc. ("U S WEST") offered a balanced set of proposals that complies with the Supreme Court's mandate, promotes the goals of the Act and sound competitive policy, and is supported by ample evidence showing how CLECs have entered the local market over the past several years, and what facilities they have required from incumbents to do so. U S WEST proposed administrable national rules that would identify — based on objective, easy-to-measure market characteristics — those cases where the short-term benefits of unbundling might justify incurring the long-term costs of diluting incumbents' and new entrants' incentives to invest in new facilities. U S WEST sought to move the debate beyond ideology to the facts, since the industry's demonstrated deployment of competitive facilities yields far more accurate and relevant information about which claimed hurdles are in fact material barriers to entry than can the abstract speculation of economists and lawyers.

By contrast, most of the CLECs have made no attempt at all to follow the law, be guided by the facts, or strike workable rules. Many of their comments advocate a blatant disregard of the Supreme Court's instructions that is nothing short of remarkable. And they claim that virtually all minimal entry burdens for the smallest entrant — even the normal start-up costs and delays that *any* new venture in *any* industry faces — are *insurmountable* barriers to competitive entry for the entire industry. They make this claim despite the obvious reality that these hardships have not, in practice, dissuaded CLECs from spending billions of dollars to deploy their own competitive facilities or expecting these investments to turn a profit. These commenters adopt unreasonable positions and frequently overreach:

- The Supreme Court faulted the Commission for assuming that "*any* increase in cost (or decrease in quality) imposed by denial of a network element . . . causes the failure to provide that element to 'impair' the entrant's ability to furnish its desired services."[1/] Yet AT&T *still* urges the Commission to rule that "any increase in the cost of service or decrease in its quality or scope that results from a LEC's denial of access would defeat the objectives of the Act."[2/] Even more remarkably, AT&T argues that the Commission must order unbundling *even if that increase in cost would not affect a CLEC's ability to provide service in the least* — in AT&T's words, "even if it were certain that CLECs would nonetheless enter on the same scale and at the same time," and "even if it were the case . . . that CLECs would be assured of 'handsome profits' without this access and that the CLECs' ability to provide service would therefore not be 'impaired.'"[3/]

- Many commenters, including ALTS, CompTel, Cable & Wireless, and AT&T, urge the Commission simply to ignore the "necessary" and "impair" standards and order the unbundling of facilities that *do not* meet these standards, even though the Court expressly rejected the Commission's approach of treating these standards as optional rather than limiting.[4/]

1/ *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 735 (1999).

2/ AT&T Comments at 9; *see also* McLeodUSA Comments at 5 (impair test is met unless CLEC can provide service "with the *same* economies" and "*same* reliability" as the incumbent) (emphasis added).

3/ AT&T Comments at 9.

4/ *Compare Iowa Utils Bd.*, 119 S. Ct. at 735-36 *with e.g.*, ALTS Comments at 31-32; AT&T Comments at 9-10, 37-38; Cable & Wireless Comments at 21-22; CompTel Comments at 21-22.

- CompTel argues that the list of unbundled elements must be set so broadly that (1) a mere "start-up" (2) that wishes to make no investment in facilities at all (3) can simultaneously enter the business and residential markets (4) offering *all* the services supported under section 254's universal service policies (5) ubiquitously across an entire state.[5] Even this is not enough for many commenters. The Ad Hoc Telecommunications Users' Committee says that unbundling must be sufficiently expansive to permit the CLEC to deploy this sort of massive super-offering *instantaneously*.[6] And MCI WorldCom goes so far as to say that the Commission's unbundling standard must guarantee the CLEC a profit on every aspect of this undertaking![7]

- Many commenters exhibit a remarkable blindness to the frenzy of competitive network-building taking place around the country. TRA, for example, claims that only one of twenty CLECs that have deployed their own switches in the New York metropolitan area is willing to lease switching at an acceptable price.[8] But TRA misses the most important point: *At least twenty CLECs have been able to make the profit case for self-deploying switches in this market and going into business without access to the incumbent's facilities.*

The Commission should reject these comments for what they are: unprincipled pleas for the Commission to defy the Supreme Court and rescue these carriers from the ordinary costs and risks of the marketplace. The billions of dollars that *other* CLECs have been willing to invest in the face of these costs and risks put the lie to the claim that profitable market entry is impossible without unrestricted access to the investments and innovations of the incumbents.

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[5] *See* CompTel Comments at 28-29.

[6] *See* Ad Hoc Telecomm. Users Comm. Comments at 6 ("And, even if an [*sic*] CLEC were financially able to self-provision a ubiquitous network within the relevant geographic market, the delay in providing *immediate* alternatives to satisfy customer demand for ubiquitous service renders its offering fundamentally non-competitive with ILECs.") (emphasis in original).

[7] *See* MCI WorldCom Comments at 18 ("[I]f unavailability threatens the ability of a CLEC to earn a reasonable return on capital in offering services generally, or for any class of customers, or in any geographic area . . . CLECs should have unbundled access to the element.").

[8] TRA Comments at 34-35.

I. THE COMMISSION SHOULD DECLINE THE CLECS' INVITATION TO DEFY THE SUPREME COURT'S MANDATE AND TO IGNORE THE INDUSTRY'S ACTUAL EXPERIENCE WITH COMPETITIVE FACILITIES DEPLOYMENT.

Many commenters essentially ask the Commission to defy both the Supreme Court's mandate and sound economic policy by adopting rules that aid specific competitors at the expense of competition. The Commission should reject their request. As set out more fully below, the Commission should adhere to five basic principles as it develops its new unbundling rules: (1) comply with the Supreme Court's instruction to apply the necessary and impair tests in a way that *limits* unbundling; (2) rely on the substantial record evidence demonstrating that carriers are deploying competitive facilities in many markets and accordingly do not need access to ILEC network elements in those markets; (3) apply the necessary and impair tests on the basis of whether an *efficient* competitor needs access to an ILEC element, not so as to ensure that every CLEC and every business plan is profitable; (4) craft national standards that account for differences in local market characteristics that affect whether CLECs need ILEC facilities in those markets; and (5) decline the CLECs' invitation to resurrect rules that were struck down by the Eighth Circuit and were unaffected by the Supreme Court's ruling.[9]

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[9] Many of these principles overlap with those outlined in the joint reply comments submitted by Ameritech, BellSouth, SBC Communications, Inc., and the United States Telephone Association. U S WEST has reviewed those joint comments and endorses the positions taken therein.

A. The Supreme Court Ruled That Congress Intended the "Necessary" and "Impair" Tests To *Limit* the Scope of Unbundling, and the Commission Is Not Free Simply To Ignore That Ruling.

Many of the CLEC commenters verge on counseling outright defiance of the Supreme Court's decision in *Iowa Utilities Board.* AT&T and other commenters attempt to portray the Court's decision as a narrow procedural ruling rather than a substantive one. According to these commenters, the Commission's only error in 1996 was that it failed to articulate sufficiently findings that would have supported its unbundling standards.[10] These commenters then suggest that the Commission's only task in this proceeding is to make the minimum recital necessary to permit the agency to reinstate Rule 319 in its entirety — or even expand it to include *new* network elements. Thus, AT&T suggests that the Commission simply has to make "two missing findings": that network elements are *never* available on terms as favorable as TELRIC outside the incumbent's network, and that *any* increase in the cost (or decrease in the quality) of an element constitutes an intolerable burden for CLECs.[11] Several commenters argue that the Commission can simply readopt the 1996 list of elements without bothering to supplement the factual record assembled three years ago,[12] and even without undertaking any particularized analysis of the individual elements on that list.[13]

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[10] *See, e.g.*, AT&T Comments at 4-6; Excel Comments at 3; MCI WorldCom Comments at 2; Qwest Comments at 13-14.

[11] *See* AT&T Comments at 5-7.

[12] *See, e.g.*, Choice One Comments at 14-15; Excel Comments at 12; RCN Comments at 14.

[13] *See, e.g.*, Ad Hoc Telecomm. Users Comm. Comments at 11-14.

But the Supreme Court's ruling may not be so easily dismissed or circumvented. *Iowa Utilities Board* was not just a procedural administrative law case in which the Court simply faulted the Commission for failing to explain its reasoning adequately. Rather, the Supreme Court held in no uncertain terms that the Commission erred *substantively* when it ruled that ILECs must give rivals "blanket access" to their networks and implemented that ruling by draining the statutory "necessary" and "impair" tests of any substance.[14/] The Court made clear that these statutory provisions actually define the network elements potentially subject to unbundling under the Act, and that the Commission erred when it read these provisions simply as ways to "soften . . . by regulatory grace" some blanket obligation to unbundle every element for which unbundling is technically feasible.[15/] The Supreme Court plainly did not believe it was engaging in a formalistic exercise when it directed the Commission to give real "substance to the 'necessary' and 'impair' requirements."[16/] On the contrary, it fully expected that proper application of these requirements would *limit* the list of elements to be unbundled, consistent with Congress's intention and design, thereby potentially rendering "academic" the incumbents' concerns with the "all elements" rule and sham unbundling.[17/] AT&T and its cohorts are therefore simply wrong when they suggest that the Commission, merely by articulating a few

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14/ *See Iowa Utils. Bd.*, 119 S. Ct. at 734-35.

15/ *Id.* at 736.

16/ *Id.*

17/ *Id.* at 736, 737; *see also* Public Utilities Commission of Ohio Comments at 5 ("It is clear that the Court wants the FCC to apply a more limiting standard on the development of a new UNE list.").

magic findings, can readopt the "any increase in costs" standard in defiance of the Court's directly contrary holding or unthinkingly resurrect Rule 319 in its entirety.

Other commenters, while less blatant than AT&T in their disregard of the Supreme Court, suggest that the Commission need only give the Court's opinion lip service. Now that the Court has made clear that the Commission's original "*any* increase in costs" (or "*any* decrease in quality") standard violates the Act, ALTS, CompTel, and many others drop the term "material" into the formula — *i.e.*, they suggest that failure to give access to an element is an "impairment" when the CLEC suffers a *material* increase in price or decrease in quality.[18/] When it comes time to apply this formulation, however, these commenters all proceed as if a peppercorn of difference in fact constitutes "materiality"; in other words, their application of the standard collapses it right back into the unlawful "*any* increase in costs/decrease in quality" tests.

For example, these commenters cite a litany of alleged impairments inherent in *any* self-provisioning of facilities (or, indeed, any effort to enter a market in any sector of the economy), down to the ordinary commercial delays attributable to establishing any relationship with a new supplier.[19/] Not surprisingly, the commenters find every single one of these hurdles to be "material" — despite the fact, as explained in the next section, that *none* of them has proved sufficiently burdensome in practice to dissuade carriers from entering the market in droves with the expectation of earning profits. Indeed, CompTel goes so far as to collapse the "materiality"

[18/] *See, e.g.*, ALTS Comments at 25-31; CompTel Comments at 2, 9-13; Level 3 Comments at 6; MCI WorldCom Comments at 4.

[19/] *See, e.g.*, ALTS Comments at 22-23; AT&T Comments at 28-29, 31, 91-92; MCI WorldCom Comments at 17-18.

standard all the way back into simple preference: A cost or quality difference is "material," says CompTel, if there is any "identifiable difference between the alternatives such that a requesting carrier would make a rational decision to use the ILEC element instead of another alternative."[20]

Defining down "materiality" in this fashion would be just as unlawful as readopting the "any increase in cost" standard. The Supreme Court directed the Commission to consider the "self-provision" of facilities or their "purchas[e] from another provider" as legitimate options for carriers entering the market.[21] This mandate precludes adopting such a weak standard of "materiality" (or "impairment") that these options are automatically defined off the table — least of all when so many carriers have proven able to take advantage of them to enter hundreds of markets. The Court just as decisively rejected the idea that an "impairment" could be anything that might lead a CLEC to *prefer* to use an incumbent's element: The Court held that the Commission cannot adopt a rule that "allows entrants, rather than the Commission, to determine whether access to proprietary elements is necessary, and whether the failure to obtain access to nonproprietary elements would impair the ability to provide services."[22] Giving lip service to the Supreme Court is not enough.

Finally, a number of commenters make the suggestion that the Commission merely has to "consider, at a minimum" — and however weakly — the "necessary" and "impair"

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[20] CompTel Comments at 10; *see also* Excel Comm. Comments at 7 (impair test met if lack of access to element would have any effect on "entrant's market decisions," such as what price to charge and "length of the time-to-market period").

[21] *Iowa Utils. Bd.*, 119 S. Ct. at 735.

[22] *Id.*

standards, 47 U.S.C. § 251(d)(2), after which the Commission may simply toss those standards out the window and order whatever unbundling it feels would further the general purposes of the Act.[23] Indeed, AT&T brazenly states that the Commission need not give these standards "any weight at all" and instead may simply reimpose the forbidden "any increase in costs" standard: "Even in the absence of a finding of 'impairment,' therefore, it would serve the Act's objectives to order unbundling whenever unbundling would lower costs to CLECs."[24] Other commenters suggest turning what is supposed to be a *limit* on the unbundling duty into a one-way ratchet. Cable & Wireless urges the Commission to rule that, while "satisfaction of the [necessary or impair] standard results in an absolute presumption that the network element will be made available on an unbundled basis," a "*failure* to meet the 'necessary' and 'impair' requirements should not be equally dispositive"; instead, it should free the Commission to order, in its discretion, whatever unbundling it believes useful to promote *any* of the goals of the Act, not just the market-opening goals of section 251.[25]

This argument, too, has no basis in law. The Supreme Court made clear, as noted above, that Congress did not intend the unbundling of network elements to turn on mere "regulatory grace."[26] The provisions of section 251(d)(2) define and limit the Commission's power to order unbundling: They are the standards by which the Commission must "determine

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23/ *See, e.g.*, AT&T Comments at 9-10, 37-38; CompTel Comments at 21-22; Level 3 Comments at 13-14.

24/ AT&T at 37-38.

25/ Cable & Wireless at 21-22 (emphasis in original).

26/ *Iowa Utils. Bd.*, 119 S. Ct. at 736.

. . . *which* network elements must be made available."[27] The Act's direction that the Commission "consider, at a minimum" the necessary and impair tests simply permits the Commission to *decline* to order the unbundling of an element that meets these standards, should unbundling inflict some special hardship on an incumbent in some individual case. The language cannot, as the commenters suggest, authorize the Commission to undermine the "necessary" and "impair" tests by ordering whatever unbundling it feels promotes the various goals of the Act — from no unbundling all the way up to blanket access.[28] Otherwise, the "necessary" and "impair" tests would serve no function in the statute whatsoever. As the Supreme Court held, "if Congress had wanted to give blanket access to incumbents' networks" based on nothing more than the Commission's discretion, "it would not have included § 251(d)(2) in the statute at all."[29]

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[27] *Id.*; *see also id.* at 738 (noting that section 251(d)(2) imposes "clear limits" on the Commission's unbundling authority).

[28] Indeed, by suggesting that the Commission may exercise virtually unbounded discretion and authority to order unbundling, these commenters are construing the Act in a manner that raises constitutional concerns. Courts make clear that administrative agencies must avoid constructions of their organic statutes that would give them unconstitutionally broad delegations of legislative authority. *See American Trucking Ass'n v. EPA*, Nos. 97-1440 et al., 1999 WL 300618, at *1-*8 (D.C. Cir. May 14, 1999); *see also Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 646 (1980) (holding that a statute should be interpreted to avoid an "open-ended grant" of authority that could be an unconstitutional delegation of legislative authority).

[29] *Iowa Utils. Bd.*, 119 S. Ct. at 735. Indeed, the very case that all these commenters cite to support the idea that the Commission need give only *pro forma* "consider[ation]" to the "necessary" and "impair" standards itself recognizes that the Commission may not ignore the express requirements of the Communications Act simply because the agency believes that a different reading might better advance the statute's goals. *See Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 189-90 (1995) (rejecting Commission's departure from the statutory definition of qualifying overbuilds, notwithstanding that Commission's departure was "theoretically sound" and might "better advance[]" the goals of the 1992 Cable Act).

In any event, adopting an "any increase in cost" standard, or its functional equivalent, would *not*, as these commenters insist, advance the goals of the Act. As U S WEST demonstrated in its initial comments,[30] the Act is about promoting competition and market efficiency, not simply giving individual new entrants whatever assistance they might need to weather the risks of the marketplace. The Supreme Court itself acknowledged that the Act embodies this sound economic principle. For that reason, it flatly rejected the Commission's contention — virtually identical to that made by the commenters here — that "[r]equiring new entrants to duplicate unnecessarily even a part of the incumbent's network could generate delay and higher costs for new entrants, and thereby impede entry by competing local providers and delay competition, contrary to the goals of the 1996 Act."[31]

B. The Uncontradicted Record Evidence of Substantial and Growing Competitive Facilities Deployment Overwhelmingly Contradicts the Assertions That Meaningful Competitive Entry Is Not Possible Without Access to ILEC Unbundled Elements.

In contrast to the situation at the time of the 1996 *Local Competition Order*, the Commission has before it an extensive record demonstrating that CLECs are obtaining network elements from non-ILEC sources in many markets. Because of the availability of this real world evidence, deciding what elements, if any, an efficient competitor needs from the incumbent to have a meaningful opportunity to provide service is an empirical exercise, not a theoretical one.

30/ U S WEST Comments at 1-5.

31/ 119 S. Ct. at 735 (citing *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15642 ¶ 283 (1996) ("*Local Competition Order*")).

The Commission should rely on this evidence of CLEC investments and facilities deployment as its primary guidepost in determining both what elements should be subject to compulsory unbundling and where such unbundling is needed.

The comments of many CLECs, particularly those that are not facilities-based, paint a bleak picture of the local telecommunications marketplace, in which entering the market for any service is virtually impossible without near-total reliance on every ILEC unbundled network element. But this picture does not describe the actual state of affairs three years after passage of the 1996 Act. The *UNE Fact Report*, the *deFontenay Report* submitted by U S WEST with its initial comments, and numerous other submissions overwhelmingly demonstrate that CLECs are deploying facilities of all types — from switches to fiber to advanced services facilities — at a rapid and growing pace. This evidence of actual facilities-based deployment conclusively contradicts the claims of AT&T, MCI Worldcom, and others that a CLEC cannot enter any market without access to ILEC network elements.

These commenters give the mistaken impression that CLECs can deploy facilities, if at all, only in the rarest of circumstances. To take one element, switching, that is the subject of much of this pessimistic talk: AT&T states that "switch-based entry is not an economically viable means to compete for most new customers" and that "attempting mass market entry *solely* by buying switches and relying on the incumbent LECs' unbundled loops makes no economic sense."[32] Similarly, MCI WorldCom proclaims that, "[i]f CLECs are not able to build market share by serving customers with unbundled ILEC switching prior to deploying their own

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[32] AT&T Comments at 88-89, 92 (emphasis in original).

switches, then the business case for deploying a switch may be delayed or undermined altogether."[33]

But these claims of impossibility cannot be squared with the facts on the ground. As the *UNE Fact Report* demonstrates, notwithstanding the alleged absence of any business case for doing so, CLECs have deployed over 700 switches since passage of the 1996 Act.[34] Moreover, many CLECs have built their entry strategy around self-provisioning of switching. Allegiance, for example, has adopted what it terms a "smart-build" strategy that is centered around deploying its own switches.[35] CLECs such as MGC and Focal have explained how they too have successfully entered markets by providing their own switching.[36] Indeed, even AT&T seems to recognize this reality when — having just declared that "switch-based entry is not . . . economically viable" — it turns around and attempts to justify the unbundling of dedicated transport on the ground that CLECs need such facilities to transport traffic to their *own switches*.[37]

The overwhelming evidence of continued investment by CLECs in their own facilities belies the claims of AT&T and its cohorts that the lack of access to ILEC network elements precludes meaningful opportunities for competitive entry. To be sure, some ILEC

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[33] MCI WorldCom Comments at 54.

[34] *UNE Fact Report*, submitted by the United States Telephone Association, May 26, 1999, at I-1 ("*UNE Fact Report*").

[35] *See* Allegiance Telecom, Inc., Form S-1, at 19 (filed Mar. 19, 1999).

[36] *See* Focal Comments at 4; MGC Comments at 4.

[37] AT&T Comments at 113.

network elements may be truly needed, at least for now, in some markets. But it is equally true that many of those elements are *not* needed by CLECs in many other markets. The Commission should not, as these commenters urge, blind itself to this evidence. Instead, it should structure the unbundling regime in a way that takes account of the reality on the ground and require unbundling of an element *only* where the evidence indicates CLECs cannot reasonably obtain the element from a non-ILEC source.

Moreover, in analyzing the evidence of CLEC facilities deployment, the Commission should be careful to avoid the fallacies and *non sequiturs* contained in many of the comments. For example, the Supreme Court required the Commission to consider *all* potential non-ILEC sources of network elements, including self-provisioning, third-party vendors, and other CLECs.[38] Despite this clear mandate from the Court, many commenters take the position that the only relevant alternative source for an element is another CLEC. In other words, these commenters ignore the possibility of obtaining elements from equipment vendors and discount self-provisioning altogether, thereby managing to define the most obvious sources of facilities out of the wholesale market altogether.[39] This leads to absurd results. The Telecommunications Resellers Association, for example, introduces a survey it took that purportedly shows only one out of twenty CLECs with switches in the New York metropolitan area was willing to lease

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38/ *AT&T v. Iowa Utils. Board*, 119 S. Ct. at 735.

39/ *See, e.g.*, CompTel Comments at 7 (describing "carriers" as the only universe of "wholesale providers" of facilities); Qwest Comments at 15-16 (*contrasting* "self-supply" with the existence of a "wholesale market" for elements); TRA Comments at 32.

switching capacity to an entrant.[40] TRA's conclusion that switching is therefore unavailable misses the obvious point: The fact that *at least twenty* CLECs could self-provision their own switches conclusively proves that lack of access to ILEC switches did not preclude meaningful opportunities for entry in this market.

More generally, the same flaw infects the claim of some commenters that the presence of one or more facilities-based CLECs in a market is irrelevant to the impairment analysis because they are not legally required to provide other CLECs with access to their facilities.[41] First, the fact that one or more CLECs have self-provisioned a particular element shows that a competitor of comparable or greater efficiency should also be able to self-provision the element. Accordingly, in that circumstance, lack of access to the ILEC network element does not preclude meaningful opportunities for entry by an efficient competitor. Second, market forces will compel the CLEC and/or the ILEC to share the facility where it is profitable to do so.

Despite the attempts of many CLECs to avoid or minimize the evidence of actual competition, the Commission has an extensive record before it demonstrating that CLECs are obtaining network elements from non-ILEC sources in many markets. As AT&T itself proudly states, "AT&T and others are making *multi-billion dollar* investments to provide broad-based

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40/ TRA Comments at 34-35.

41/ *See, e.g.*, Ad Hoc Telecomm. User Comm. Comments at 5 (even a market with "two non-ILEC facility-based providers does not assure the competitive availability of UNEs to CLECs" because "non-ILECs . . . have no legal obligation to offer network elements"); ALTS Comments at 51 ("In many cases, alternative facilities have been built for self-provisioning purposes and they have not produced excess capacity that has resulted in the development of ubiquitous a [*sic*] wholesale market for such services."); Illinois Commerce Commission Comments at 10.

services to areas that reach substantial numbers of the nation's homes and businesses."[42] The evidence before the Commission concerning who is making these investments and where is the most reliable guide for determining the circumstances in which the necessary and impair standards are and are not satisfied.

C. Contrary to the Assertions of Some CLECs, the Commission Should Define the Necessary and Impair Tests in Terms of Whether an Efficient Competitor Could Enter the Market, Not Whether Every Potential Business Plan of Every CLEC Would Be Profitable.

The Commission should reject the arguments of commenters that urge adoption of a "least common denominator" approach under which an element must be unbundled everywhere as long as at least one CLEC somewhere in the country might need it to provide service. The necessary and impair tests are not met by a showing that an inefficient competitor or one with a very specialized business plan needs an ILEC network element to make that particular business strategy profitable. Instead, the standard must be an objective one, focusing not on whether a particular *competitor* would be aided by unbundling, but rather on whether unbundling would further the development of *competition* and promote consumer welfare.

A number of commenters propose that the necessary and impair tests be applied "in a manner that considers and makes possible UNE entry by large and small competitors alike" and takes into account "varying business plans."[43] Indeed, some go so far as to urge that unbundling be broad enough so that a "start-up" can enter and provide all the business and

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[42] AT&T Comments at 19-20 (emphasis added).

[43] ALTS Comments at 34; *see also* KMC Telecom Comments at 6-7; Level 3 Comments at 13.

residential customers in a state all the services supported by universal service.[44] Sprint even goes the final step: it claims that the statutory test is whether "*any*" carrier would be impaired by lack of access to an element.[45]

The premise of these positions is that section 251(c)(3) is designed to aid individual competitors. ALTS says outright that the goal of this interpretation is "[t]o serve all carriers fairly."[46] But competition does not treat all competitors fairly — it winnows out those that are inefficient. *No* market anywhere in the economy functions so as to ensure that *any* competitor that wants to enter with whatever business plan it chooses can achieve instantaneous profitability. Notwithstanding the fervent wishes of some commenters, Congress did not design section 251(c) as a corporate welfare program to guarantee success in the marketplace.[47]

In any competitive business endeavor, a new entrant faces certain costs and obstacles. In many cases, its costs will be higher than those of existing businesses until it achieves a scale sufficient to spread its fixed costs over at least the minimum number of units that an efficient competitor will sell. Indeed, entrepreneurs usually start businesses knowing that they will lose money in early years as they invest in infrastructure even while having few customers. Likewise, a new entrant in any market will by definition not be able to bring service to its customers as quickly as an incumbent will. Contrary to the views of some commenters, the

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44/ *See* CompTel Comments at 28-29.

45/ Sprint Comments at 22.

46/ ALTS Comments at 34.

47/ *See, e.g.*, MCI WorldCom Comments, Kwoka Declaration at 8 (noting that CLECs desire to avoid sunk costs normally associated with entry).

proper inquiry is not whether a new entrant CLEC faces any costs or disadvantages that an ILEC does not.[48] As the Commission observed when it streamlined regulation of AT&T in the interexchange marketplace,

> The issue is not whether AT&T has advantages, but, if so, why, and whether any such advantages are so great as to preclude the effective functioning of a competitive market. An incumbent firm in virtually any market will have certain advantages — including, perhaps, resource advantages, scale economies, established relationships with suppliers, ready access to capital, etc. Such advantages do not, however, mean that these markets are not competitive, nor do they mean that it is appropriate for government regulators to deny the incumbent the efficiencies its size confers in order to make it easier for others to compete.[49]

The fact that a CLEC may not earn an immediate profit without access to an ILEC network element does not satisfy the impair test. Just as in any other free market, an efficient entrant will be able to overcome the normal costs and problems of entry. *Unbundling is intended to eliminate barriers of entry that go beyond the normal costs and obstacles new entrants in all markets must bear.*

Many commenters also err by focusing on whether a CLEC could duplicate an ILEC's entire existing network without access to ILEC network elements.[50] That too is the wrong inquiry. The whole premise of the Commission's forward-looking cost approach is that

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48/ *See, e.g.*, AT&T Comments at 35-38, 93-98; MCI WorldCom Comments at 17.

49/ *Competition in the Interstate Interexchange Marketplace*, Report and Order, 6 FCC Rcd 5880, 5891-92 ¶ 60 (1991).

50/ *See, e.g.*, ALTS Comments at 52 (arguing that transport must be unbundled because most CLECs do not have the resources "to begin duplicating the ILEC transport network").